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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 191.

THE SALINA STOCK COMPANY AND ELWIN A. IRELAND, APPELLANTS,

vs.

THE SALINA CREEK IRRIGATION COMPANY.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF FOR APPELLANT.

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Star Printing Co.

(15,213.)

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STATEMENT.

The plaintiff, respondent here, alleged that it was the owner of all the waters of Salina Creek; that Yogo and Neoche Creeks were tributaries of and furnished about one-half of the waters of Salina Creek; that the defendant, appellant here, at frequent times during the six years immediately preceding the bringing of this action, had, by means of dams and ditches by them constructed, diverted all the waters of Yogo and Neoche Creeks, so that the same became wholly lost to the plaintiff, and the plaintiff and its stockholders were thereby deprived of sufficient water wherewith to mature the crops growing upon their land to plaintiff's damage in the sum of $10,000, and that defend-

Defendant moved for a new trial on the following grounds:

(1.) Accident which ordinary prudence could not have guarded against.

(2.) Surprise which ordinary prudence counld not have guarded against.

(3.) Insufficiency of evidence to justify the findings.

(4.) The findings are against law.

(5.) The judgment is against law.

(6.) Error in law occuring at the trial and excepted to by the defendant. (R. p. 9.)

The motion was made on affiidavits and a statement of the case.

The affidavits appear in the record pages 9 to 17 both inclusive.

The statement appears in the record pages 17 to 54 both inclusive.

Motion for a new trial was overruled; defendant excepted. (R. p. 54.)

Defendant appealed to the Supreme Court of Utah Territory from the judgment, and from the order overruling the motion for a new trial. (R. p. 54.)

At the June term 1891, of the Supreme Court of Utah Territory, said appeal was heard and decided, and judgment rendered as follows:

"Saturday, September 12, 1891.

"This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered and adjudged, that the judgment of the District Court therein be and the same is hereby modified, and this cause is remanded back to said District Conrt with directions to modify the decree and findings therein in conformity with the opinion of this court."

(R. p. 56.)

The opinion of the court so far as it relates to modifi-

cation of the decree of the District Court is as follows: (R. p. 60.)

> "Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants are entitled to the use of more water than is awardad *them* in the decree of the court below, and that the decree of the court below as well as the findings of facts should be modified and made more certain so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party without a resort to further proceedings.
>
> "This should be done upon the proofs taken in the case without the necessity of awarding a new trial.
>
> "The respondent should be entitled to the use and appropriation of all the waters flowing or to flow through or in Yogo and Neoche creeks during the period from and including the 15th day of June to the 1st day of November in each year except that during twenty-four hours of Monday of each week during that period the appellant shall have the exclusive use of one-half of the waters flowing through Yogo creek, and that during twenty-four hours of Friday of each week duriug that period the appellant should have the exclusive use of one-half of the water flowing through Neoche creek for farming, grazing, stock-raising, and culinary purposes, and that during all such period the appellant should also have the right to use the waters of both such creeks as may be necessary for watering stock and for culinary purposes only, and that from and including the first day of November to the fifteenth day of June in each and every year the said respondent should be entitled to the use and appropriation of such waters of Yogo and Neoche creeks as it may need for culinary and domestic purposes and for watering stock and agricultural purposes, not exceeding one-half the waters flowing through such creeks, and that during the same period last stated the appellant shall be entitled to use and appropriate *of* such waters of Yogo and Neoche creeks as it may need for the same purpose not exceeding one-half of the waters flowing through such creeks, and each party should be enjoined from interfering with the rights of the other under such decree.

"This case is remanded with directions to the court below to modify the decree and findings so as to conform to this opinion."

SPECIFICATION OF ERRORS.

The appellants base their appeal on the record of the case and on the following errors, which they hereby assign on the appeal, viz:

"The Supreme Court of Utah erred in vacating the findings of the court below, and rendering said order, judgment and decree of September 12th, 1891, on the evidence taken at the trial below."

(R. p. 62.)

BRIEF OF ARGUMENT.

I.

Appellants claim that the Supreme Court of the Territory of Utah had no power to make a decree on the evidence: that if the finding do not support the decree, it may direct the proper decree (*i. e.* one justified by the findings sent up) to be made, *but if the findings are not justified by the evidence the only course, in cases of this kind is to send the cause back for a new trial.*

In this case the appellate court held that the findings were not justified by the evidence, but instead of sending the cause back for a new trial, it remanded the cause "with directions to modify the decree *and findings* therein, in conformity with the opinion of that (appellate) court. That court in its opinion says:

"Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants are entitled to the use of more water than is awarded them in the decree of the court below, and that the decree of the court below as well

> *as the findings of facts* should be modified and made more certain so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party, without a resort to further proceedings. This should be done upon the proofs taken in the case without the necessity of awarding a new trial."
> (R. p. 59.)

Under our code and code practice, we contend that this cause should have been sent back for a new trial.

This would not, however, be true under the old chancery practice; there the case was always referred to a mastery to take the testimony and the trial court never saw the witnesses, could draw no inference from their manner of testifying, bearing on the stand, etc., and, seeing only the written depositions, had no better opportunity than the appellate court to arrive at the truth. Under such circumstances it was a necessary result that his findings of fact carried no weight not due to respect for the opinion of a man of learning. And the rule that the appellate court would not disturb the findings if there were a substantial conflict in the evidence did not exist; that rule presupposes that the trial judge has exceptional means of arriving at the truth, and is the proper person to judge of the facts.

Taking the old English chancery practice (*i. e.* prior to the judicature acts) as a type an appeal was first heard before the judge who tried the case, the Master of the Rolls or one of the Vice Chancellors, or before the Lord Chancellor; but in all cases in the same court if before a different judge, it was called a *rehearing* or appeal, and was in truth a rehearing. New evidence could be introduced, though some exceptional reason had to be shown therefor. Such rehearings or appeals were not limited to one but a second petition of appeal could only be filed with the consent of the Lord Chancellor on showing good cause therefor. It is

true there was a further appeal as matter of right to the House of Lords which was still in the nature of a rehearing, the right to hear new evidence being still asserted but in practice only new documentary evidence being admitted.

Under this system an appeal was always a new trial before the same or a different court; the findings on the prior trial having nor inherent weight and the court making a new decree in accordance with what it deemed the weight of the evidence.

It is hardly necessary to mention that the present chancery court of appeals is one of comparatively recent creation.

When our code was enacted it was contended that it did not apply to equity cases; that the district and supreme courts of the Territory having been given common law and chancery jurisdiction by act of Congress, that the manner of the exercise of the chancery jurisdiction could not be regulated by the Territorial Legislature; and this view was first accepted by the Supreme Court of the United States in Orchard vs. Hughes, 1 Wall., 77, Judges Nelson, Field and Swayne dissenting, but in Hornbuckle vs. Toombs, 18 Wall., 652, Orchard vs. Hughes was overruled, and on page 656, the court say:

> "Our conclusion is, that the practice, pleading and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject as before said to a few express or implied conditions in the Organic Act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves."

And the court therefore held that the code applied with the same force to chancery as to common law cases.

Since then an act of Congress expressly enacted the rule laid down by this decision.

18 Stat. at Large, 27.

By the code it is provided that the trial court shall in all cases find the facts and the method of trial is the same in common law as in chancery causes, except that a jury can be demanded or waived in a law case.

Compiled Laws of Utah, Volume II, Sections 3379-3380, as follows:

> "Sec. 3379. Upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.
>
> "Sec. 3380. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly."

The methods of appeal are precisely similar; an equity case going up by bill of exceptions or statement, at the option of the party.

Compiled Laws of Utah, Volume II, Sections 3404-3646-3648, as follows:

> "Sec. 3404. The judgment roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow, and the same, or a copy thereof, be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto, and serve the same, or a copy thereof, upon the party appealing or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement, as provided by Section 536, but the statement shall contain only the grounds argued before the court for a new trial, and so much of the evidence or other matters as may be necessary to explain them; and it

of exceptions, as is provided after the entry of judgment, or after receiving notice of such entry, as provided by Section 526, (§3395) and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.

"3. If the motion is to be made on a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon, the same proceedings for the settlement of the statement shall be taken by the parties, and the clerk and judge, as are required for the settlement of bills of exceptions by Section 526. (§5395) If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him, as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee, for settlement, without notice to the adverse party. When the notice of motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion, errors in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disre-

garded on the hearing of the motion. It is the duty of the judge, or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

"4. When the motion is made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict, or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied."

It will be seen from this that that the appellate court is not in the same position to judge of the facts as the trial court. The latter sees the witnessess, draws inferences from their manner of testifying and hears all of the testimony; the former only reads in cold print that portion of the testimony supposed by the trial judge to illustrate the exceptions.

It does not follow from this that the appellate court cannot set aside a finding when very clearly unsustained by the evidence, but it does follow that it would be most unsafe for it to attempt to make its own findings on the evidence.

The decisions under the code, in the absence of a special statute are uniform on this subject.

The case of Ellis vs. Geans, 26 California, 272, was an action of ejectment, but tried before the court without the intervention of a jury. Findings were made finding for plaintiff for 180 acres more than the evidence showed him

to be entitled to, and judgment was rendered in his favor in the court below in accordance with the findings. The particular description of the 180 acres did not appear in either the pleadings, findings or judgment. To avoid the objection in the supreme court, the respondent offered to release the 180 acres from the operation of the judgment. The court say:

> "If the particular location of the 180 acres appeared either in the pleadings or by the findings, we might order the modification upon the basis of the record, but there is nothing in either showing the location, and we are not at liberty to examine the evidence for the purpose of determining the location as a question of fact. To do so would be to exercise original rather than appellate jurisdiction."

The case of Carpenter against Gardiner, 29 California 160, was likewise an action of ejectment, tried before the court without a jury, in which damages were claimed and found in favor of plaintiff in a sum exceeding that warranted by the evidence. Plaintiff, in his brief in the supreme court, offered to remit the excess of damage, and the court on page 164, say:

> "It is not our province to find the facts upon the evidence in the record, and for this reason a new trial would be necessary if the plaintiff should insist upon damages. The plaintiff, in his brief, in case the court is of the opinion that there was error in the findings, offers to remit such portion of the sum mentioned in the findings, as the court may think proper. The finding does not afford the data for making any apportionment. This could only be done by assuming the functions of a jury, and finding the damages upon the evidence, a duty which is not devolved upon this court. The entire damages must be remitted, or the judgment reversed and a new trial had."

The case of Lick vs. Diaz, 37 California, page 437, was an equitable action, to quiet title, and was before the Supreme Court for the third time, and it was there urged that they should render a final judgment on the evidence,

and not send the case back for a fourth trial. The Court say:

> "The counsel have urged us, in view of the protracted and expensive litigation which has already occurred about this lot, to render a final judgment in the case if practicable. But the result must depend on controverted facts, which is not our province to decide, and it is therefore impracticable for us to render a final judgment."

This judgment of the court was concurred in by Chief Justice Sawyer, afterwards U. S. Circuit Judge of the Ninth Circuit, and a rehearing was afterwards denied by Judge Sawyer.

Rush vs. Casey, 39 California, 339, was likewise an equitable action. On page 343, the court say:

> "If the findings are erroneous it is not our province on an appeal from the judgment to look into the evidence with a view to reform the findings, and then to enter a judgment in accordance with what we think the findings ought to have been. In doing so, this court would undertake to weigh the evidence and usurp the functions of a trial jury, whose especial province is to pass upon the facts. We have repeatedly decided in cases of that character that where the findings do not support the judgment instead of undertaking to reform the findings by examination of the evidence we will reverse the judgment and remand the case for a new trial."

Polhemus vs. Carpenter, 42 California, 375, was an action to foreclose a mortgage with a cross-complaint to have an accounting between plaintiff and defendant and to declare the mortgage security only for the balance found to be due on taking such account. On page 386 the court say:

> "The findings are so manifestly defective as not to require comment. Instead of stating facts involved in the issues, they contain only general conclusions drawn from the facts. They afford no information whatever as to the particular facts which the court considered as established in the case. The defendant was clearly entitled to have more specific

> findings on the facts within the issues and on this ground the judgment should be reversed and a new trial awarded. We are urged by the appellant to look into the accounts and by ordering a final judgment to put an end to this protracted litigation, but there are several material facts on which the evidence is conflicting, and it is not the practice of this court in such cases to adjudicate disputed facts. It is the province of the lower court to pass upon the facts, and when there is a substantial conflict in the evidence we will not disturb its findings on the ground that they are against the weight of evidence."

Poorman vs. Mills, 43 California, page 323, was an action at law, tried before the court, in which there were no express findings of fact, written findings having been waived.

On page 324, the court say:

> "The plaintiff requests this court to direct the court below to enter judgment for him for the full amount of the certificate of deposit. There would be no hesitation in doing so if the court below had expressly found the facts which we think the evidence tends to prove. But as the court decided for the defendants, it will be implied that one or more of the material facts were found against the plaintiff. It is not the province of this court, as we have often held to find the facts of a case, but only to correct the errors, if there be any, of the court below."

See also C. P. R. R Co. vs. Yolland, 49 Cal. 445-6.
Downing vs. Graves, 55 Cal. 549.
Hidden vs. Jordan, 32 Cal. 401.

The case of Dyer vs. Brogan, 57 Cal. 234, was to foreclose a lien for work done on one of the streets of the City of San Francisco, in pursuance of a street assessment. It was necessary to prove a demand prior to bringing suit. The plaintiff offered competent evidence of such demand in the form of a statutory affidavit, which was erroneously excluded by the court below. The supreme court so held,

and reversed the judgment. A motion was then made in the supreme court to modify its judgment of reversal and direct the court below to enter judgment for plaintiff.

On page 236, the court say:

> "If this motion was granted we should direct the court below to enter a judgment for the plaintiff on findings which show the defendant entitled to judgment, for the finding is distinct that no demand was ever made. Such a demand was essential to a recovery, and the court finds there was none. Judgment for defendant follows as a matter of course. The record in the court below, if the modification asked for was made, would show a most illogical result.
>
> "A judgment rendered for the plaintiff on facts established definitely by the findings showing that the defendant is entitled to the judgment. Judgments of course appealed from are sometimes reversed in this court on the findings as insufficient to sustain the judgment, and a judgment rendered here for the appellant; but it is only where the judgment is not the deduction from the facts found which the application of the rules of law for the admeasurement of the rights of the parties indicate as the proper judgment. In other words, the only tribunal authorized to find it has found the minor premise (the facts of the case) correctly upon the evidence before it; but in applying the major premise, the law, to the minor, has drawn a wrong conclusion, upon which a judgment has passed not justified by the rules of law. The result reached by the conclusion and judgment in such cases is illogical. The facts found show that the judgment does not follow as a logical conclusion from them. The law has suffered and this court can redress the injury and correct the error by ordering the proper judgment to be entered. The record in the court below was illogical and therefore illegal before, and after correction it is legal and logical. But in this case, to make it logical, if the judgment is modified as asked, the findings of fact must be changed. This court has no power to perform such an act. In our view, this court did not rest its judgment on the ground that the evidence was insufficient to justify the decision. * * * But if such point had been before us for adjudication, and we had come to the conclusion that it was well taken the cause must have been rever-

> sed for the same reason as in the other state of case discussed above; in order that the only legally authorized tribunal, the court below, might try the facts."

This same question is elaborately discussed in Section 296 of Hayne on New Trial and Appeal, where a conclusion is reached in harmony with the above decisions. The same author also discussess Section 53 of the Code of Civil Procedure of California, which is the same as Section 3006, Vol. II, Compiled Laws, embraced in the Utah Code of Civil Procedure, to-wit:

"The supreme court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial, or further proceedings to be had;" and arrives at the conclusion supported by the foregoing cases: that this only authorized the entry of the proper judgment or order when the facts as found by the court below justified such judgment or order, and that when the facts did not justify such judgment or order, the case must be sent back to that court for a re-trial of the facts, and that the supreme court will never render a judgment on evidence simply.

The Code of Civil Procedure of Utah was adopted from California and with it was adopted the interpretation placed thereupon and upon matters of practice thereunder by the Supreme Court of California.

The same conclusion has been reached elsewhere.

In Griffin vs. Marquardt, 17 N. Y. 33, Haight vs Williams, 46 N Y. 683, Vermilyea vs. Palmer, 52 N Y., page 471, and in Barnes vs. Williams, 11 Wheaton 415, it was held that upon a special verdict, the court cannot intend any substantive fact not found, though the record contains sufficient evidence to warant the jury in finding it; and if the verdict is so imperfect that the court cannot decide the questions of law on which the opinions of the judges were

opposed, the cause must be remanded and a venire *de novo* awarded.

In Exchange National Bank vs. Third National Bank, 112, U. S. 293, in an action at law tried before the court without a jury in which there were findings of fact, the court held that the Supreme Court will on reversing a case order a new trial, and cannot itself render a judgment for damages from the evidence.

The Supreme Court of Utah has in effect maintained the same doctrine. In the case of Wells vs. Wells, 24 Pac. Rep., 754, it was argued that the findings of the court were not justified by the evidence, and this court said:

> "But even if upon reading the testimony, this court might reach a different conclusion as to the facts or some of them, this would not be ground for a reversal. Where a case is tried on oral testimony before the court without a jury, its findings of fact are conclusive in this court on an appeal, unless they are so palpably erroneous, and unsupported by the evidence as unmistakably to demonstrate that the court committed some oversight or acted under some mistake, and this rule applies in equitable as well as in legal actions."

The rule here contended for only exists where the appeal of an equitable action is not in effect a retrial. Under the old Chancery System, the findings of the trial court had no especial weight, and the appellate court arrived at its conclusion in the same manner as if the case was for the first time on trial; but under the new system, the rule as laid down in Wells vs. Wells is clearly correct, and recognizes the fact that a trial court has exceptional means of arriving at the truth, and that the appellate courts should make no decrees on evidence.

It may possibly be contended that the case of Stringfellow vs. Cain, 99 U. S. 610, countenanced the method adopted in the case at bar.

That case was a special statutory proceeding insti-

tuted in a probate court to settle disputes between claimants, under the townsite act, to a lot in Salt Lake City. The Territorial Statute provided (Comp. Laws, Utah, 1876, p. 381):

> "Sec. 4. That if at the expiration of six months after the first publication of the notice as aforesaid, it shall be found by the statement filed that there are adverse claimants to any tract or parcel of land, it shall be the duty of the judge of probate to cause notice to be served upon said claimants, or their agents or attorneys (taking up each case in the order of filing) to appear before the probate court of the county in which such tract or parcel of land may be situated, and prosecute their claim upon a day to be appointed by said court, not less than five nor more than thirty days from the service of such notice; the statement filed as aforesaid shall stand in said court in the place of pleadings and an issue be made thereon; and on the day set for the hearing the judge shall proceed to hear the proof adduced and allegations of the parties, and decide according to the justice of the case. The court shall cause full minutes of the testimony to be kept, which shall be preserved with the papers in the case and be entered upon the records of said court, with the decision at length. If either party shall feel aggrieved at the decision of said court, he, she or they shall have the right of appeal to the district court, as in other cases, and upon the perfection of such appeal, the court shall cause the testimony and written proofs adduced together with the statements of the parties and the judgment of the court, to be certified to the district court, to be there tried anew without pleadings, except as above provided.

So under these special statutory proceeding the respective claimants should file statements of their claim before the probate court; on the hearing full minutes of the testimony should be kept, and in case of an appeal to the District Court the Probate Court must "cause the testimony and written proofs adduced; together with the statements of the parties and the judgment of the court, to be certified to the District Court, to be there tried anew,

without pleadings, except as above provided." On the trial in the District Court no new evidence could be introduced, but it was tried anew on the evidence so sent up by the Probate Court. The District Court did not see the witnesses and had no better means than the Supreme Court of ascertaining the truth.

In this case of Stringfellow vs. Cain, the Supreme Court of the Territory set aside the findings of the trial court and directed a decree on the evidence, at the same time making its own findings from the evidence. The Supreme Court of the United States, in Stringfellow vs. Cain, expressly declined to decide that the same course could be followed in ordinary civil actions, but in upholding the action of the lower court stated its reasons therefor, so as to exclude the rule in ordinary civil actions. After stating that the action was statutory and the provisions of the statute governing its trial, the court say:

> "Without undertaking to decide what would be the proper practice in an ordinary civil action when a judgment is reversed because a new trial was refused in the District Court, we are clearly of the opinion that in a suit like this, where all the evidence is before the Supreme Court *that could be considered by the District Court* if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the District Court. * * * *Upon a new trial no new testimony could be introduced.* The District Court could do no more than find the facts which in the opinion of the Supreme Court should have been found before and the judgment which should follow from those facts may just as well be settled by the Supreme Court on the first appeal as on a second."

All of this reasoning is entirely inapplicable to a case like the one at bar where new evidence could be intro-

duced on a retrial and the case therefore made to assume a new aspect.

It may be contended that the decision of this court in Gray vs. Howe, 108 U. S. 12, is authority for the action of the Supreme Court of Utah Territory in this case,

That case was also a special statutory proceeding to settle a dispute between claimants under the townsite act to a lot in Salt Lake City in the Territory of Utah.

In that case "the only exceptions to the findings below were that they were contrary to the evidence" and a judgment was rendered by the Supreme Court of Utah Territory, in every way inconsistent with those findings.

This court in its opinion says:

> "The necessary inference therefore is that the findings, sent up by that court, were set aside, and the case disposed of on the evidence. This it was also said in *Stringfellow vs. Cain* might be done *in this class of cases.*"

The expression "in this class of cases" was evidently intended to refer to "special statutory proceedings," where all the evidence is before the Supreme Court, *that could be considered by the district court if the case should be sent back*

Stringfellow vs. Cain, 99 U. S. 614.

II.

It is probable that on a retrial of this action evidence can and will be introduced, showing the conditions under which each party has to use the water and which will enable the court to frame a decree preventing injury to either; but as the case now stands this is impracticable, because it was tried on a different theory.

In its opinion, the court say:

> "These facts taken in connection with other evidence in the case goes to show that respondent's appropriators and

grantors did not make prior appropriation of all of the waters of Salina Creek prior to the time that appellants' appropriators and grantors appropriated *nearly all of the waters of Yogo and Neoche Creeks in 1878.*

"It is not enough for the respondent to show that appellant diverted some of the water from the stream, if what was left to the respondents' use was more than its appropriation or more than it is shown to have obtained by the deeds of the actual appropriators with whom respondent has proved a continuous, connecting, subsisting title; for if it be true that the respondent has failed to connect itself with the title of all the first appropriators—except by verbal sale—its appropriation does not ante-date its own possession, which possession was in part shown to be subsequent to 1878."

We understand that the above extract states both law and facts correctly and it would seem to follow that if appellants did not divert from Salina creek an amount of water interfering with respondent's grantors appropriation as it existed prior to 1878, that respondent could not complain.

Just five of the respondent's grantors were shown to have been residents of Salina and appropriators of water prior to the date of the appropriation of defendants' grantors, and no appropriation or title is shown in any of the other grantors of respondent. These five grantors claimed to have owned a water right for 124¼ acres. On this point the court has fallen into an error: on page 4 of the opinion it is stated:

"The several persons shown to have owned water in Salina creek and to have conveyed their right to the respondent by deed, only claimed to have appropriated water sufficient to irrigate from two to five hundred acres in a dry season, while the capacity of the stream is shown to be sufficient to irrigate from four to five hundred acres in a dry season, and more than double that number of acres in a wet season."

Now the record discloses the names of these persons

and the deeds to respondent set forth particularly the number of acres of water right each of them claimed to convey and the total amount is not from 200 to 400 acres, but only 124¼ acres, to-wit:

N. C. Rasmussen and wife,	-	10¼ acres (R. p. 21.)
Elizabeth Ann Rasmussen	-	15 acres (R. p. 21.)
Thos. G. Humphrey,	-	29 acres (R. p. 26.)
E. W. Crane,	- - -	25 acres (R. p. 25.)
W. H. Rex,	- - - -	45 acres (R. p. 24.)
		124¼

and for the amounts transferred by each see Exhibit A (R. p. 45) for all except E. W. Crane and Exhibit D (R. p. 47) for Crane, and this was the limit of the amount claimed, not simply in a dry season but in any season.

This court also finds that the aggregated waters of Neoche and Yogo creeks constitute a third of the waters naturally flowing in Salina creek; if this be so it is evident that defendants might take all of the waters of Yogo and Neoche during all the seasons of the year, and still leave flowing in Salina creek more than respondent's prior appropriation of 124¼ acres, and if appellants by so doing interfered with the rights of others, such others would be the ones to complain.

It is to be remembered that the record discloses no evidence that respondent has been deprived of water, unless such deprivation follows as a necessary consequence of the use by appellants of the waters of Yogo and Neoche.

III.

Further as appears by defendant's (appellant's) affidavits on motion for a new trial (R. pp. 9 to 17) new evidence could, and no doubt would be introduced relative to

appellant's appropriation and use of the waters of Yogo and Neoche creeks, and further showing made of the necessities of the several parties and the conditions under which the irrigation should be conducted; by which the court might be guided in making division of the water.

In the case at bar, justice would be subserved by a new trial and we respectfully submit that the decision of the Supreme Court of the Territory of Utah should be reversed.

C. W. BENNETT,
Attorney for Appellant.

Office Supreme Court U. S.
FILED.
MAR 30 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 191.

THE SALINA STOCK COMPANY AND ELWIN A. IRELAND, APPELLANTS,

vs.

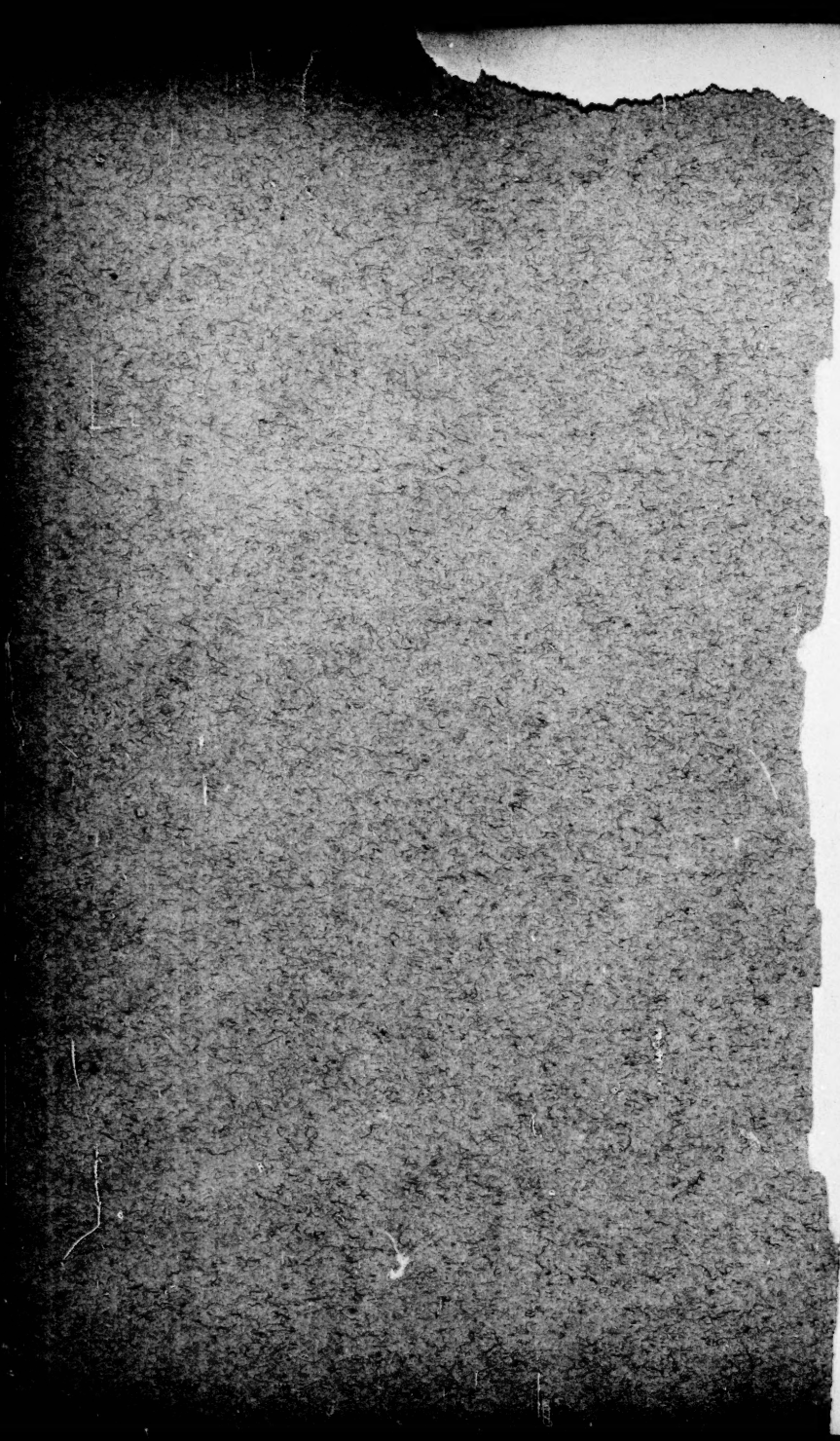
THE SALINA CREEK IRRIGATION COMPANY, APPELLEE

Appeal from the Supreme Court of the State of Utah.

BRIEF FOR APPELLEE.

J. L. RAWLINS,
Attorney for Appellee.

Salt Lake Herald Print.



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THE SALINA STOCK COMPANY AND ELWIN A. IRELAND, APPELLANTS,

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THE SALINA CREEK IRRIGATION COMPANY, APPELLEE.

Appeal from the Supreme Court of the State of Utah.

BRIEF FOR APPELLEE.

This suit was brought in the First District Court of Utah by the Appellee against the Appellants to enjoin them from interfering with the waters of Nioche and Yogo creeks in Sevier County, Utah. Upon trial the District Court stated its findings of fact and conclusion of law in writing, upon which a decree was entered. From this decree the defendants appealed to the Supreme Court of the Territory. The latter court directed certain modifications of the findings and decree of the lower court so as to award to the defendants more water than had been allowed them by that court. All the evidence was before

the Supreme Court. The contention of the defendants in that court was that the findings and decree of the lower court were not sustained by the evidence. No statement of facts in the nature of a special verdict made by the Supreme Court of the Territory appears in the record.

The sole question presented by counsel for the Appellants in this court is whether the Supreme Court had the power upon a review of the evidence to direct a modification of the findings and decree of the Dictrict Court. It is contended that its power was limited to either affirming the decree of the lower court or sending the case back for a new trial; that the authority of the Supreme Court is so limited under the Code of Practice in Utah. In support of this counsel refer to certain provisions of the local statute.

It is admitted that under the old chancery practice upon an appeal the case might be retried upon the evidence. It is claimed, however, that under that practice the lower court had no opportunity of seeing the witnesses or of observing their manner in giving testimony; while under the practice in Utah witnesses are orally examined in open court in both equity and law cases. Hence it is claimed that the appellate court should not disturb the findings of the lower court except for the purpose of granting a new trial. Section 1869 of the Revised Statutes provides that "The Supreme and District Courts respectively of every territory shall possess chancery as well as common law jurisdiction." Section 1869 provides: "Writs of error, Bills of Exception and Appeals shall be allowed in all cases from the final decisions of the District Courts to the Supreme Courts under such regulations as may be prescribed by law, but in no case removed to the Supreme Court shall trial by jury be allowed." These terms "Writs of Error" and "Appeals" are used distinguishably in accordance with their well understood meaning. The Supreme Court would exercise its chancery jurisdiction in review of the final decisions of the District Court by appeal, with all the authority which these terms imply. This construction is necessary to give effect to the language employed, namely, that the court has "chancery as well as common law jurisdiction."

Of course its common law jurisdiction exercised by writ of error would be more limited. The act of Congress of April 7th, 1874 concerning the practice in Territorial Courts and appeals therefrom provides: "Section 2, That the appellate jurisdiction of the Supreme Court of the United States over judgments and decrees of said Territorial courts in case of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and mode of proceeding as the said Supreme Court have prescribed or may hereafter prescribe. Provided; That on appeal instead of the evidence at large a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree." In the case of San Pedro Etc. Company vs. The United States, 146 U. S. at page 130 this court held that its authority on appeal from the Territorial court is limited to determining whether the court's findings of fact support its judgment or decree and whether there is any error in rulings duly excepted to on the admission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. In the leading case of Stringfellow vs. Caine. 99 U. S. at page 614 this court, speaking with reference to the power of the Territorial Supreme Court to review the facts upon the evidence and to direct a decree to be entered in conformity to the facts so found and answering the contention that it had no such power, used this language, "There is no statute of the Territory which in express terms creates the necessity for such an action and we do not think the practice act when fairly interpreted requires it," and holding that in that case the Territorial Supreme Court possessed this authority.

In the case of Gray vs. Howe it was held that where the Supreme Court of a Territory on appeal reverses the judgment of a District Court and sets aside the findings of fact and makes

no new statement of facts in the nature of a special verdict the judgment of the Supreme Court of the Territory must be affirmed on appeal. In this case the following language was used: "In Stringfellow vs. Caine, 99 U. S. 610 it was held if the findings of the District Court were sustained and a general judgment of affirmance rendered in the Supreme Court the findings of the District Court thus approved by the Supreme Court would furnish a sufficient statement of facts for the purposes of an appeal to this court. So, too, if there is a reversal and another judgment rendered on the facts as found. But here the only exceptions to the findings below were that they were contrary to the evidence and a judgment has been rendered by the Supreme Court in every way inconsistent with those findings. The necessary inference, therefore, is that the findings sent up to that court were set aside and the case disposed of on the evidence." It will thus be perceived that the only case where it becomes necessary for the Territorial Supreme Court to make a statement of facts in the nature of a special verdict is where that court is dissatisfied with the findings of the lower court, and yet it is insisted by Counsel on the other side that notwithstanding the express provision of the act of 1874 above quoted under these precise circumstances the Supreme Court has no authority to make such statement or to render or direct the decree which will be the legal result of the facts so stated. In their view the Supreme Court under no circumstances can exercise the power expressly conferred by act of Congress. In certain classes of cases the act of Congress gives the right of appeal from the judgments of the Supreme Court to this court. As already seen it has been frequently decided by this court that its authority is limited to determining whether the facts as stated by the Supreme Court of the Territory support its judgment or decree. And it has been further decided that where the Territorial Supreme Court directs a judgment not in conformity with the findings of the District Court and makes no statement of facts in the nature of a special verdict this court must affirm that judgment. Such is the

case at bar, as in this case no statement is contained in the record and the decree of the Territorial Supreme Court was not in conformity with the findings made in the District Court. In accordance with the rule laid down in Gray vs. Howe, Supra, the judgment in this case must be affirmed.

That the Territorial Supreme Court may modify a judgment of the District Court is contemplated and provided for in Section 846 of the Code of Practice which is as follows: "When the judgment is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order." The Territorial Supreme Court has frequently exercised the authority complained of. It did so in the case of Stringfellow vs. Caine; also in the case of Gray vs. Howe; and also in the case at bar.

To the same effect is the case of Paragoonah Field and Canal Company vs. Edwards, 35 Pac. Rep., 487, in which it was held that the fact that a decree is uncertain and ambiguous in some particulars is no ground for reversal on appeal where all the papers and proceedings are before the Supreme Court, and the decree may be modified by it without any injustice to the parties.

So in the case of Mining Company vs. Jennings, 5 Utah, 243, upon a review of the evidence the Supreme Court directed a modification of the findings and judgment of the lower court and referred the case back for a rehearing upon a single question.

Counsel seek to distinguish the cases of Stringfellow vs. Caine and Gray vs. Howe, Supra, on the ground that in neither of these cases did the District Court have an opportunity to see the witnesses and all the evidence was before the Supreme Court which could be considered by the District Court. But those cases are in reality decisive of the question here. The sole question raised upon this appeal relates to the power of the Supreme Court under any circumstances in a case not tried by a jury to find facts differing from those found by the District Court upon a review of the evidence. This power is nowhere made to depend upon whether the court below saw the witnesses or

whether both parties had exhausted their sources of evidence. The same provisions of law and the same rules of practice apply alike to all such cases. Both the power and the procedure are the same. Beside it is not correct that under the Utah practice the District Court in all equity cases sees the witnesses or that an oral examination of them takes place in open court. In the case of the Nephi Irrigation Co. vs. Jenkins, reported in 31 Pac. Rep. 986 the Supreme Court of the Territory uses this language: "The power of the court in hearing equity cases to avail itself of the services of a master is equally well settled as its authority to call to its assistance a jury and the aid of a master is needed more than that of a jury. The decree of the court below is reversed and the cause is remanded to the District Court with directions to refer the cause to a master for examination and consideration and with power to receive other evidence if offered by the parties, or either of them, or on his own motion and to report all the evidence and his findings of fact. The court in its discretion may direct him to state his conclusion of law. Any party to the action may appear before such master and may file exceptions with the master to his report in order that he may correct the same if required."

From this it will be seen that the practice in equity causes may not differ in the method of taking testimony from that which prevailed under the old chancery practice. But it is difficult to perceive why the power of the Supreme Court should be limited or extended in any particular case on account of the method of taking testimony which may have happened to prevail in that case in the lower court. If in a given case the Supreme Court in looking over the evidence should find that the witnesses were examined orally before the lower court it might look upon the findings made by that court from such evidence more favorably and less favorably if the court below did not see the witnesses; but in either case its power to set aside or modify the findings of fact made by the lower court, if it should conclude that they were not sustained by the evidence, would remain the same.

The case of Wells vs. Wells quoted from by counsel did not question this power of the Supreme Court. The Supreme Court while possessing the power to set aside or modify the findings of the lower court might still adhere to the rule that it would not do so except where such findings were "so palpably erroneous and unsupported by the evidence as unmistakably to demonstrate that the court committed some oversight or acted under some mistake." This language recognizes rather than denies the power which the Territorial Supreme Court exercised in the case at bar.

The cases cited by Counsel from California and elsewhere cannot be regarded as authority in this case as they were rendered under statutory provisions wholly different from those regulating and controlling the powers of the Supreme Court of Utah. However an examination of the cases in California and New York will disclose that the decisions in those states upon this question have not been at all uniform. It will be of no assistance to the court to cite the numerous conflicting views of different state courts upon this question.

The case of Exchange National Bank vs. Third National Bank cited by counsel from 112 U. S., 293 has no bearing upon this question. In that case the evidence was not before this court and the special findings of facts did not cover the issue as to damages. This court having held that under the facts plaintiff was entitled to damages, was under the necessity of referring that question back for trial to the lower court.

The second point urged by counsel is that it is probable "That on a retrial of this action evidence may and will be introduced showing the conditions under which each party has to use the water and it will enable the court to frame a decree preventing injury to either.' In answer to this it is sufficient to say that in this case numerous witnesses testified and all the evidence offered bore upon these questions. It is to be presumed that each party offered all the evidence which it could command in support of its own rights. But whether this was the case or not is not a matter for review or consideration by this court. It will

not consider any of the questions which are presented under the second and third headings of Appellant's Brief, neither can it consider under the rule laid down in Gray vs. Howe the principal matter discussed.

In all cases it is for the public convenience that there shall be a speedy termination of litigation. In controversies in Utah relating to water rights it is of the greatest importance that they should be speedily and finally ascertained and determined. In this case the defendants in the District Court, appellants here, using the water unlawfully above the point where it was used by the plaintiff, found their greatest security in wrong-doing by a prolongation of this controversy. They have no just cause of complaint at the decision of the court below and its judgment should be affirmed.

J. L. RAWLINS,
Attorney for Appellee.

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